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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947.

LOUISE CAMP, Administratrix of the Estate of Irving (Ervin) Camp, Deceased,

Petitioner,

vs.

FRANK A. THOMPSON, Trustee for the St. Louis-San Francisco Railway Company, Debtor,

Respondent.

No. 472

RESPONSE TO PETITION FOR CERTIORARI

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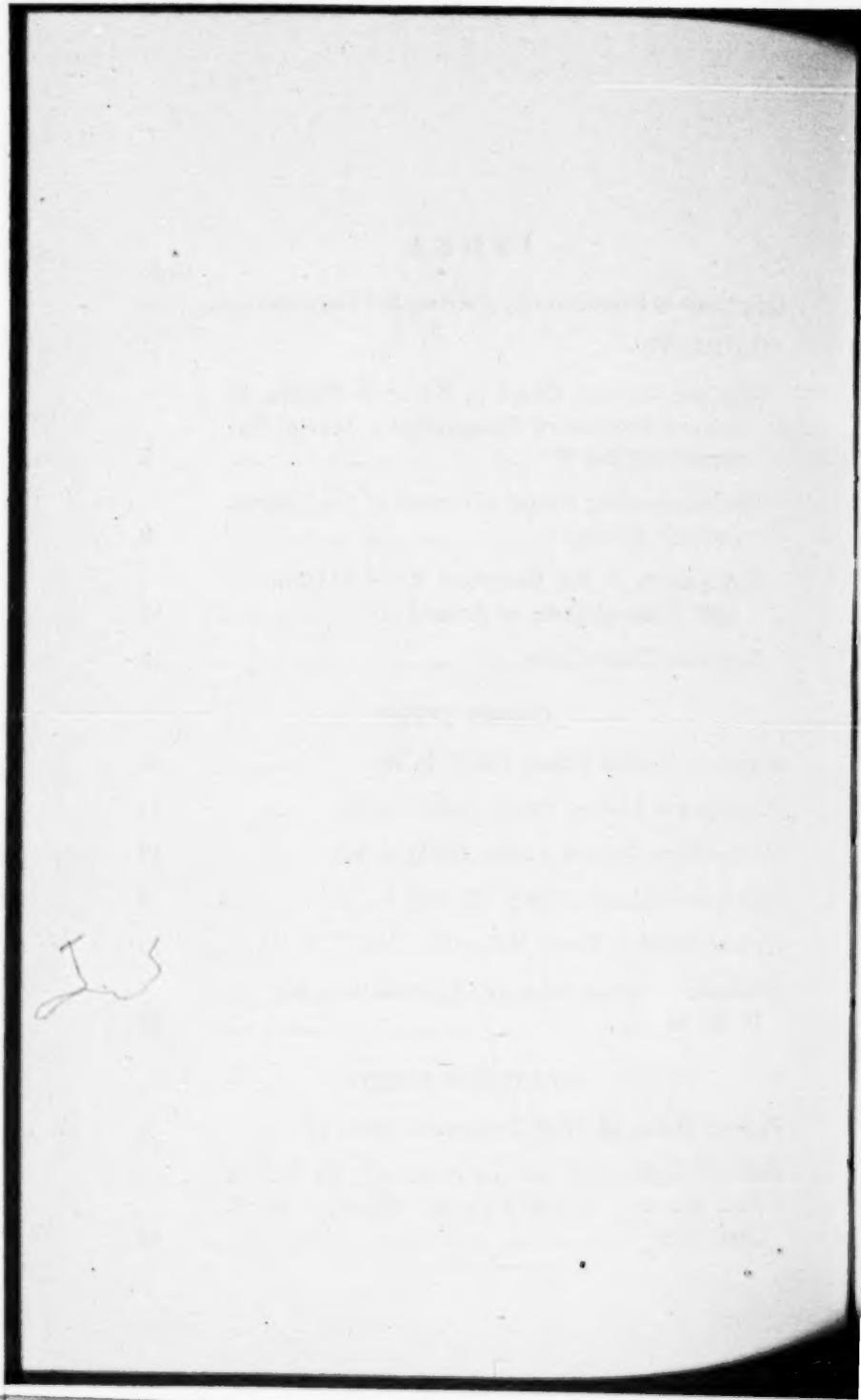

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TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition for certiorari states that important questions are raised by the action of the Circuit Court of Appeals for the Sixth Circuit in reversing the judgment of the trial court and remanding for a new trial and states those questions to be:

I.

"Under Rule 51 of the Federal Rules of Civil Procedure, what is the correct practice in regard to objecting to the charge of the Court and the Court's failure to give a requested instruction, and did respondent properly object to the failure of the District Judge to give special instruction number 2?

II.

"Whether the Circuit Court of Appeals failed properly to apply in a civil case the 'harmless error statute' (Sec. 269 of the Judicial Code as amended) by reversing the judgment of the District Court for a technical error not affecting the substantial rights of the parties?

III.

"Was the District Court in error in failing to give respondent's special instruction number 2?"

We submit that upon examination there is no substantial question presented by the petition for certiorari.

WAS THE DISTRICT COURT IN ERROR IN FAILING TO GIVE A PORTION OF RESPONDENT'S SPECIAL REQUEST NUMBER 2?

Petitioner states that she recognizes that this question would not justify the granting of her petition, but takes the position that the request should not have been granted. In view of petitioner's attitude the matter will not be discussed at length, but it is important to point out that there is no question presented on the record as to whether the *entire* special request number 2 should have been given. The question is as to whether a certain portion of that request should have been given. Petitioner

has treated the matter as presenting the question as to whether the entire request should have been given, but as stated, that question is not presented on the record. It is important to bear the distinction in mind when considering the reasons given by petitioner for asserting that the denial of the request was proper and also when considering the exceptions which were taken by respondent in the trial court.

It is also important when considering the reasons given by the Circuit Court of Appeals for reversing upon this ground.

Special request number 2 was as follows:

> "Should you find the plaintiff is entitled to damages, it becomes my duty to charge you how to determine those damages. The damages are limited to such amount as you may deem proper for conscious pain and suffering suffered by the plaintiff's intestate, Ervin Camp, and to such loss as results to the plaintiff and their children because they may have been deprived of a reasonable expectation of pecuniary benefits by the death of said Ervin Camp. In determining the amount of such pecuniary benefits of which they may have been deprived you may take into consideration age, health, expectancy of life of the deceased, his earning capacity, his character, his mode of treatment towards his family and the amount he contributed from his earnings to their support. *In determining the amount of pecuniary benefit which the plaintiff and her children may have lost you may not include any amount as contributions which the children would have received after they have attained the age of twenty-one years since it is not presumed that they would receive any pecuniary benefits from the deceased thereafter. You should also take into con-*

sideration the fact that all persons do not live to the age of expectancy, that this is particularly true in the case of hazardous occupations, that they may not work during all of the years of their life, that their earnings may not remain stationary and that the reasonably to be expected contributions may vary or diminish in the future.

"After you have determined the amount of damages under these rules, you should diminish the same for any contributory negligence which you find the said Ervin Camp to have been guilty of should you so find, the damages being diminished in accordance with the rules I have heretofore given you.

"And finally, it is your duty in determining the amount of damages, if any, due the plaintiff to reduce the same to their present cash value since it is considered that a lump sum of money in hand at the present time is worth more than a sum of money payable over a period of future years. It is accordingly your duty to reduce such damages to their estimated present cash value."

R. 569, 570.

This request was submitted before the Court's general charge was given and at that time the Court stated that he thought the substance of the request would be given in the general charge and therefore the request would not be given.

R. 537.

The Court, however, when giving the general charge, failed to give certain portions of the special request number 2 and following the giving of the general charge the following occurred:

"COUNSEL FOR DEFENDANT: We except to the charge on damages insofar as it failed to *embody certain portions* of the defendant's special request number 2 to the effect that the jury should not consider or does not have to consider that a man will live to his full expectancy, and that it should take into consideration that he may not, particularly in a hazardous occupation; they should take into consideration every element, such as the fact that the plaintiff might remarry, or that the—that a child may not live to maturity, or that she may die before her expectancy and other elements of a like nature.

MR. ARMSTRONG: I am willing for you to read his special instruction on that.

THE COURT: That is the purpose of this little conference right at this time, to call the attention of the Court to anything that resembles error in the Court's charge. You are excepting; do you concede to the re-reading?

MR. TURNER: No, I am excepting, and I am not agreeing that certain portions of the charge or certain other submitted charges may be now read and reread, except to state my exception that it overemphasizes the matter of damages to the plaintiff here. I am entitled to that exception."

R. 568, 569.

The above proceedings are quoted in the petition for certiorari, but the petition fails to quote the last remarks of the trial Judge. Following the quoted discussion the trial Judge said:

"I will give you the benefit of an exception on that. I will stand on the Court's charge on damages. I think to go into all those details is unnecessary in charging the jury on damages."

R. 570.

The Court will see from the foregoing proceedings that the question presented is not whether the entire request number 2 should have been given, but only whether that portion in italics should have been given.

In support of her position that it was not necessary for the trial Judge to give the requested portion of special request number 2, petitioner says that it presented merely matters with which everyone was familiar and which were peculiarly within the knowledge of a jury and that it was unnecessary to call them to the jury's attention. There are many occasions in charging a jury when it is deemed advisable and necessary for the protection of one or the other parties to call to the jury's attention matters with which ordinarily they would be familiar. It is not so much a question as to whether they are familiar with such matters, but it is done for the purpose of insuring the fact that those matters are brought to their attention so that they will not be overlooked during their consideration of the verdict.

This is of particular importance where evidence of annuity tables and mortality tables is admitted. It is doubly so when as in this case the trial court admits evidence of the price for which an insurance company would sell an annuity policy or contract. Much stress is put upon such evidence during the trial of the case and it is important that the jury should not lose sight of the fact that the tables of mortality and similar tables are only averages.

This is of further importance in cases such as this where the future earnings and future contributions are considered. A jury is prone to give undue weight to such evidence.

Likewise it was important that the jury be told that contributions to the children would not run past their majority. The issue of reasonably to be expected contributions to the decedent's family was in the suit. The contributions which a person may reasonably expect to receive may be considerably different from the contributions which he has the right to receive under the law. Many parents contribute substantially to the support of their adult children. The jury might well have supposed that they could include such contributions in their verdict unless they were told that there was such a limitation.

With respect to this point petitioner takes the position that the general charge did not refer to a loss sustained by the children and did refer to the decedent's disposition to furnish his wife money.

It is clear, however, as pointed out by the Circuit Court of Appeals, that the general charge told the jury that they should determine the pecuniary loss which the plaintiff had sustained. The plaintiff, of course, was the administratrix and the pecuniary loss sustained was that which the widow and children had sustained. Such a recovery was sought by the complaint and insofar as the reference in the charge to furnishing the decedent's wife money is concerned, the petitioner's evidence was that the money was furnished her by decedent for the support of the entire family which included the children all of whom were present in court and all of whom were made the subject of extensive evidence.

Petitioner also says that the trial Court was correct in refusing to give this portion of special request num-

ber 2 because special request number 2 in its entirety was erroneous in that a portion of it referred to "the amount of the damages" being reduced to their present cash value rather than the amount of earnings. This portion of the request was not embodied in the portion covered by the exceptions. That portion was substantially given by the general charge and there was no reason to except on that basis.

In considering whether this portion of the special request number 2 should have been given it must also be remembered that the Circuit Court of Appeals did not reverse this case solely because of the failure to give this portion of special request number 2, but did so particularly in connection with the fact that the trial Judge had admitted in evidence testimony as to what a life insurance company would sell an annuity for. It was respondent's position that this evidence was erroneously admitted because it was irrelevant and did not bear upon any of the issues in the case. The Circuit Court of Appeals in its opinion said:

> "When coupled with a proper instruction on the measure of damage, as hereinafter pointed out, such a ruling is not erroneous."
>
> R. 614; 163 Fed. 2d, 403.

The Circuit Court of Appeals then goes on to consider this special request, and its action in reversing the case for failure of the trial Judge to give the request or so much thereof as was excepted to cannot be divorced from the fact that the trial Judge's action in admitting the evidence referred to was held proper only in the event such an instruction were given.

DID RESPONDENT PROPERLY OBJECT TO THE DISTRICT JUDGE'S ACTION?

It seems clear that the Court's action in failing to give the portion of special request number 2 which is under discussion was erroneous and the question is then presented as to whether the respondent properly objected to that failure.

Petitioner claims for this question undue importance in stating that a serious question as to practice under Rule 51 of the Federal Rules of Civil Procedure is involved. We submit that no such important question is involved.

That rule is as follows:

> "INSTRUCTIONS TO JURY: Objection. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto *before the jury retires to consider its verdict,* stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

The substance of this rule simply is that one objecting to the Court's failure to give an instruction must do so before the jury retires to consider the verdict and in doing so must distinctly bring to the Court's attention the basis of the objection.

We submit that this rule was fully complied with. The request was submitted in writing before the general charge was given. After the charge was given counsel for respondent distinctly stated the basis of respondent's objections to the failure of the Court to give certain portions of the special request number 2. Petitioner would place upon respondent the duty at that time of handing to the Court a written request embodying only the portion of the special request with which the objections were concerned. This would have been a useless procedure because the Court already had that portion of the special request in writing. All that was necessary was to state to the Court that its charge had failed to include those matters and to state to the Court the basis for the objection. This was done and it is clear from the record that the Court fully understood the issue then presented and not only understood it but took the definite position that the Court's charge was clearly correct and that such matters as these were unimportant and the jury was not concerned with them.

On Page 15 of the petition for certiorari counsel states that the Court cannot be put in error for refusing to accept an entire instruction a portion of which was covered by the general charge. This question is not involved since it clearly appears from the record that respondent was not complaining of the Court's failure to give the entire request, but was complaining merely of the Court's failure to give a certain portion of it, which was not covered by the general charge, and since that portion was already submitted in writing and was definitely and clearly pointed out, there was no necessity for any further action on the part of the respondent.

Petitioner also makes the point that the Circuit Court of Appeals found that the general charge did not deal with the fact that the jury should not include contributions to the children after they had reached majority, and that no exception was taken with respect to that portion of the special request covering this phase of the law. The portion of the request to which the exceptions went was certainly pointed out to an extent sufficient to acquaint the trial Judge with the matters complained of. As a matter of fact specific reference was made in the exception to the fact that the charge did not sufficiently point out a number of elements which included the fact that a child might not live to maturity or that the widow might remarry and other elements of a similar nature. All that the rule requires is that the trial Judge be fully acquainted with the objection which is being made. It is impossible to read this record and reach any conclusion other than that the trial Judge in this instance was fully acquainted with the objections which were being made and concluded after considering them that they should be overruled.

APPLICATION OF THE "HARMLESS ERROR STATUTE" (Section 269 of the Judicial Code as amended).

Here again petitioner is attempting to urge upon this Court the granting of her petition for reasons alleged to be of importance where actually the question presented has been many times decided by this Court.

Section 269 of the Judicial Code as amended (28 USCA, Sec. 391; Act of February 26, 1919, Ch. 48, 40 Stat. 1181) is as follows:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions *which do not affect the substantial rights of the parties.*"

Petitioner says that there is presented by this record a case where it affirmatively appears that the refusal by the District Court to give the requested instruction was harmless error and then states that even if mistaken in this position, it can hardly be contended that there is an affirmative showing that the refusal was prejudicial, and takes the position that under the statute the burden is upon respondent to show that the refusal was harmless.

We submit that petitioner is in error in both positions.

Petitioner says that there is a conflict between the decisions of the various Circuits Court of Appeal in their application of this statute in civil cases which should be resolved by this Court as petitioner avers was done in criminal cases in the case of *Kotteakos v. United States*, 328 U. S. 750 (1946).

This Court has several times construed the application of this statute in civil cases:

United States v. River Rouge Co., 269 U. S. 411, 46 S. Ct. 144, 70 L. Ed. 339;
Williams v. Great Southern Lbr. Co., 277 U. S. 19, 48 S. Ct. 417, 72 L. Ed. 761;
McCanless v. United States, 298 U. S. 342, 56 S. Ct. 764, 80 L. Ed. 1205.

The McCanless case was decided in 1936. It can hardly be said to be of ancient vintage. The opinion was by Mr.

Justice Sutherland who a year before had written the opinion in *Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629 which is relied upon by petitioner.

The opinion of the Court in the McCanless case leaves no doubt about the proper construction of the statute. The Court in that case said:

> "In this situation, section 269 is not controlling. That section simply requires that judgment on review shall be given after an examination of the entire record 'without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.' This, as the language plainly shows, does not change the well-settled rule that an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it *affirmatively* appears from the whole record that it was not prejudicial. United States v. River Rouge Co., 269 U. S. 411, 421, 46 S. Ct. 144, 70 L. Ed. 339; Fillippon v. Albion Vein Slate Co., 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853; Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 48 S. Ct. 417, 72 L. Ed. 761."
>
> 298 U. S. 347.

If there is any divergence between the opinions of the Circuit Courts of Appeal as to the application of this statute in civil cases, it would seem to be unjustified in view of the clear language of the Court in this opinion and it is hardly likely that a further opinion upon the subject would clarify a rule which is already clearly expressed.

Under this rule it is clear that this statute has no application in the instant case because certainly it does not affirmatively appear from the entire record that the

Court's refusal to give the requested portion of special request number 2 was harmless. It may be that some individuals would have rendered the verdict which was rendered in this case regardless of whether the requested instructions were given, but whether this Court or some other Court or some juror would have so acted is not the test. The test instead is whether the action complained of might reasonably be thought to have influenced the jury in reaching their verdict. It is clear that the refusal to give this request may have seriously influenced the jury in reaching their verdict and likewise it is clear that this was a matter which touched upon substantial rights of the parties. It was not, as counsel would indicate, a mere technical matter, but it was a matter of substance. Petitioner says it was a technical matter because petitioner would have reached the same verdict or possibly because petitioner thinks the jury would have reached the same verdict even if the requested charge had been given. That as indicated is not the test.

This point is clearly brought out in the case relied upon by petitioner, Kotteakos v. United States, 328 U. S. 750. In that case the Court said:

> "and the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision."
>
> 328 U. S. 764.

Again the Court in that opinion said:

> "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment

was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

328 U. S. 765.

That is exactly the rule laid down by the Court in the McCanless case, and when we apply that rule to the instant case it is clear that the error cannot be said to be harmless for regardless of what one as an individual may feel he would have done as a juror, it still remains that we cannot with fair assurance, after considering the entire proceeding, say that the judgment was not substantially swayed by the failure to give this requested charge, and that being true, it is impossible to say that substantial rights were not affected.

We submit therefore that there is no merit in the petition and the same should be denied.

Respectfully submitted,

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